FILED
AUG 10 1961
JAMES R BROWNING Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

NO. [redacted] 121

BAUER-SMITH DREDGING CO., INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF TO THE BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 1007

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This reply brief is submitted because the opposition brief obliquely turns the questions presented in the petition in such a manner as to place the issues discussed in the petition in a false light. The opposition attempts to divert attention away from the inconsistent position taken by the Government in regard to the administration of Federal contracts. The Government, in its opposition brief, concedes that the Contracting Officer designated by the Secretary of Army certified and declared that the petitioner performed the dredging contract in question in

accordance with the plans and specifications of the Federal dredging contract and properly deposited dredged material in areas designated by the United States. The Government then takes the inconsistent position that the Federal dredging contract was not properly performed and on that basis alone charges the petitioner with negligence. This inconsistency is subtly presented by referring to a third party State Court decision, where a jury found that petitioner did not perform the Federal dredging contract in question according to Federal plans and specifications. On this ground alone the State Court held petitioner to be negligent. After knowingly and deliberately refusing to be a party to third party litigation, the Government now disavows its Contracting Officer's prior contrary findings and in lieu thereof accepts a third party jury finding. To date, the issue of whether the Government or its contractor was negligent has not been litigated because the United States has elected to use sovereign immunity as a legal shield.

THE GOVERNMENT'S QUESTION REVISED

With the above explanation, one can appreciate the incompleteness and the inaccuracy of the question as presented in the opposition brief (pp. 1 and 2). It should have read as follows:

> "Whether petitioner is entitled to indemnity from the United States for amounts paid by it to third parties in a case where petitioner performs its contractual obligations to the United States to the complete satisfaction of a Federal Contracting Officer and in strict accordance with the plans and specifications of the dredging contract in question."

The opposition brief does not touch on such vital questions as (1) Can the Justice Department disregard the certification of an agency of the Executive Department to the effect that a Federal contract was properly performed and in lieu thereof accept the fact findings of a State Court in a third party lawsuit, in which the United States refused to be a party? (2) Can the Justice Department defend a contractor's claim in the Court of Claims on the grounds that a State Court judgment overrules the fact findings of a Federal Contracting Officer relating to the performance of a Federal contract in a case where the breach of contract and negligence of the United States was not and could not be litigated by reason of sovereign immunity? (3) Can the Federal Government avoid its contractual obligations in a case where one branch of the Government certifies that a contractor's contractual obligations have been completely satisfied and where, at a later date, another branch of the Government disavows the satisfactory performance of a dredging contract on the grounds that subsequently a State Court held a Federal contractor negligent because its Federal contract was not performed in accordance with Federal plans and specifications? These and many other questions of far reaching public interest remain unanswered in the opposition brief.

ARGUMENT

1. If the principles of law established in *United States v. Moorman*, 338 U.S. 457, still govern, then the United States is estopped from arguing, either directly or indirectly, that the Federal contract was improperly performed or that dredged material or salt water was placed in an area or canal not designated by the United States. The opposition apparently appreciates the impact of the

Moorman decision but attempts to obliquely circumvent the Supreme Court ruling by arguing that petitioner was negligent. This argument is fallacious because it fails to advise the Court that the negligence relied upon is based solely upon a State Court fact finding that dredged material was deposited in places not designated by United States. The truth of the matter is, that the Federal Contracting Officer had previously declared and found as a fact, with full knowledge of the third party claim, that the dredged material was properly deposited in places designated by the United States. (Pet. 25, 26, 44-51). Since the Contracting Officer's ruling is conclusive by the terms of the contract, any argument or presentation of evidence by the Government to the contrary is irrelevant and immaterial and of no moment, in the absence of pleading and proof that the Contracting Officer acted in bad faith. To date, nobody has questioned the integrity, honesty and efficiency of the Federal Contracting Officer.

2. On a Motion for Summary Judgment, the Court of Claims, without any fact evidence before it, save an involved and technical dredging contract, concluded that petitioner was an independent contractor and not an agent. In rebuttal to the opposition brief, petitioner urges that the issue of agency was determined in Star Chamber fashion, without giving the contractor an opportunity to prove facts that the Government had sufficient control of the dredging project to place petitioner in the capacity of an agent of the Corps of Engineers, U. S. Army.

3. Contrary to the statement in the Government's brief, (p. 9) petitioner did not predicate its claim for reimbursement, indemnity or restitution upon a State judgment but predicates a recovery upon the dredging contract under consideration, as well as established principles of contract

law. It is the Government, not petitioner, who is relying on the State Court judgment. The Government seeks to erase the effect of its Contracting Officer's fact findings by relying on a State Court jury decision in a third party lawsuit in which the United States deliberately refrained from being a party after timely notice of the third party claim and litigation.

4. The Government relies upon Clause 11 of the dredging contract, relating to the negligence of the contractor, to defeat petitioner's contract action. In so doing, the Government seeks to insulate its own breach of contract and negligence. To date, the issue of the Government's negligence or breach of contract has not been litigated. By summary judgment procedure, petitioner has been denied the right to prove that the Government's inaccurate and improper dredging plans resulted in third party damage claims. Clause 11 was not intended to excuse a breach of contract on the part of the United States or its failure to furnish proper plans and specifications to its contractor or to penalize a Government contractor who is forced to defend a third party lawsuit alone while the United States sits on the side lines. The Government now disavows the findings of its own Contracting Officer and in its opposition brief stresses the third party negligence finding without admittng that the Unted States had already declared that the dredged material was deposited in accordance with the Government's plans and specifications.

5. The opposition brief states on page 10, that *United States v. Moorman*, 338 U.S. 457, is not applicable because the Contracting Officer made no decision concerning petitioner's negligence. This is begging the question. The Contracting Officer ruled upon facts which are binding upon the United States and are final and conclusive as far as

this contract action is concerned. On these facts, it is legally impossible for petitioner to be negligent on the grounds that dredged material was deposited in areas not designated by the United States.

6. It is argued in the opposition brief that the decision below poses no serious problem in the Government's business relationship with its contractors and does not affect the public interest. The truth is that every Government contractor must know, and has a right to know, the scope of the risk he assumes when he enters into a Government contract. Upon the calculation of the risk, the contract price is computed. A Government contractor must know whether he is required to serve only one or two masters, to-wit: the Contracting Officer of the United States and/or State Court juries. It must be admitted that a novel situation exists when the Federal Government concedes that State Courts may determine whether a Federal contractor exceeds the authority granted to him by the United States authorities. To argue that a State Court judgment in a third party damage suit can be substituted for a contrary finding made by a Federal Contracting Officer, is to argue against the position taken by the Justice Department in the *Moorman* case and related cases and the decision of this Court. The public interest in these cases was conceded by the Justice Department.

CONCLUSION

As heretofore mentioned, the case at bar presents a Federal and State conflict issue regarding the manner in which Federal construction contracts shall be performed and administered and construed. This case also presents a question of the encroachment of State authority upon Federal authority in reference to the performance of Federal

contracts. As between the Corps of Engineers, U. S. Army, and the Department of Justice, there is a conflict as to the method of determining whether a Federal contract is properly performed according to Federal plans and specifications. It is in the public interest that these conflicts be resolved so that Government contractors are not left in the position of paying third parties for the Government's mistakes. The decision below places upon qualified and bonded Government contractors, responsibilities not compatible to sound business practices and fair dealing.

Respectfully submitted,

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